Grant Thornton

Indirect Tax Update

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Summary

Welcome to this week's ITU.

The Upper Tribunal has issued two VAT judgments in the past week. The first case concerns an appeal by Tower Bridge GP Ltd (TBGP) against a decision of the First-tier Tax Tribunal (FTT). The case concerns HMRC's refusal to refund input VAT to TBGP on the purchase of Carbon Credits in 2009. HMRC had refused the claims for input VAT on the basis that TBGP did not hold valid VAT invoices to support the claim. The FTT agreed with HMRC and confirmed that HMRC had lawfully exercised its discretion not to accept alternative evidence of entitlement. The Upper Tribunal has now considered the case and has issued its judgment dismissing TBGP's appeal.

The second case concerns an appeal by Westow Cricket Club against HMRC's decision to impose a penalty for the incorrect issue of a zero-rating certificate in relation to the construction of a new cricket pavilion. The FTT dismissed the club's appeal. The club had taken advice from HMRC (which turned out to be incorrect). The FTT confirmed that the club was not entitled to rely on the advice from HMRC as constituting a reasonable excuse for the incorrect issue of the certificate.

The Upper Tribunal has allowed the club's appeal. It considers that the FTT made a number of errors of law in relation to the reasonable excuse issue.

Tower Bridge GP Ltd v HMRC - Upper Tribunal

Recovery of Input Tax

The UK's VAT Act and VAT regulations are reasonably clear in relation to the reclaiming of input VAT incurred by a business. Regulation 13 of the VAT Regulations stipulates that the supplier must, generally, issue a VAT invoice to his customer and Regulation 14 makes it clear that a VAT invoice must contain certain information (including, amongst other requirements, the VAT registration number of the supplier and the name and address of the customer). Regulation 29 similarly makes it clear that to make a claim for input tax, the recipient of the supply must hold a VAT invoice. In this case, the invoices in question related to the purchase of carbon credits but did not show a VAT number for the supplier nor did it show the appellant's name or address. HMRC refused to refund the VAT shown on the invoices on the basis that the VAT invoices were invalid. The VAT regulations also give power to HMRC to use discretion and to allow alternative forms of evidence where strict compliance with the invoicing regulations is absent. However, in this case, HMRC refused to exercise its discretion in favour of TBGP.

The company appealed to the FTT. The FTT upheld HMRC's decision to deny TBGP's claim to deduct input tax on the basis that firstly, TBGP did not hold valid VAT invoices for the input tax claimed in relation to those transactions and secondly, HMRC had lawfully exercised its discretion against allowing TBGP to deduct the input tax. The company appealed to the Upper Tribunal.

TBGP argued before the Upper Tribunal that, in essence, it held an invoice in relation to each of the transactions which met the substantive conditions of the VAT Directive. Accordingly, as a matter of EU law, it had a directly effective EU law right to reclaim the VAT even though some of the formal details required by VAT law were absent from the invoices. Alternatively, in relation to the issue of discretion, TBGP contended that HMRC's decision not to exercise its discretion to accept alternative evidence and allow deduction of the input tax was unreasonable because HMRC took into account irrelevant matters and/or acted irrationally or otherwise failed properly to exercise their discretion.

In the circumstances, the Upper Tribunal disagrees with the appellant. A taxable person wishing to reclaim input VAT in relation to supplies needs to meet the formal requirements of both EU and domestic VAT law. The requirement to provide a VAT number and the name and address of the customer are essential elements for the proper functioning of the VAT system. Accordingly, TBGP could only be entitled to reclaim the input VAT in question if HMRC exercised its statutory discretion to allow alternative evidence. The Upper Tribunal found no fault with the FTT's reasoning in relation to the discretion issue. In fact, the Upper Tribunal actually endorsed the FTT's reasoning. On the facts of the case, the decision of HMRC not to exercise its discretion under Regulation 29 in favour of TBGP was reasonable. The Upper Tribunal dismissed TBGP's appeal.

Comment – One can understand the stance taken by HMRC in this case. The supplier was not registered for UK VAT (yet charged VAT to TBGP) and did not account for the VAT collected from TBGP. HMRC considered that the transactions in question were connected to VAT fraud and that TBGP should have undertaken more detailed due diligence in relation to its supplier. At the first appeal, the FTT found that HMRC was entitled to exercise its discretion not to allow the reclaim and here, the Upper Tribunal has confirmed that the FTT's decision was correct. Given the values involved in this case, it is possible that TBGP may seek leave to appeal to the Court of Appeal.

Upper Tribunal

Westow Cricket Club v HMRC

Under UK VAT law, the construction of certain buildings can qualify for zero-rating. The most obvious examples are buildings that constitute domestic dwellings (ie places where people live), but there are also a number of other situations where zero-rating can apply. For example, the construction of student accommodation or other residential accommodation such as a care home and accommodation for the armed forces.

Where a building is not to be used for residential accommodation purposes, it can, nevertheless, still qualify for zero-rating if it is a building intended for use for a relevant charitable purpose. This is defined in UK VAT law as use by a charity otherwise than in the course or furtherance of a business or as a village hall or similarly in providing social or recreational facilities for a local community. In either case, the charity can only obtain zero-rating if it provides the contractor with a certificate stating that the building is to be used for a relevant charitable purpose.

To prevent the misuse of such certificates (and the obtaining of a VAT saving in incorrect circumstances), UK VAT law provides for HMRC to impose a penalty for the incorrect issue of a zero-rating certificate. That was the issue in dispute in this case. HMRC contended that as a Community Amateur Sports Club (CASC) the cricket club was not a charity. Accordingly, it was not intending to use and could not use the pavilion for a 'relevant charitable purpose'. HMRC imposed the penalty on the basis that the certificate was issued incorrectly because the club was not a registered charity. The penalty was assessed in the amount of £20,937, that sum being 100% of the VAT that the builder would have been liable to pay if the works had not been zero-rated. The club appealed to the FTT against the penalty on the basis that it had a reasonable excuse for issuing the zero-rating certificate, it having conceded that it should not have done so. The club contended that it relied on written advice from HMRC to the effect that the supply of the building works would be zero-rated. The FTT dismissed the club's appeal confirming that the club could not rely on HMRC's advice.

The club appealed to the Upper Tribunal. It argued that the FTT had made an error of law because it confused reasonable excuse with 'legitimate expectation'. The Upper Tribunal dismissed that argument, but agreed that, in the circumstances and on the evidence, the club was entitled to rely on the advice (albeit wrong advice) contained in HMRC's letter.

The club had been quite open in its letter in disclosing its status as a "non-profit making" organisation. HMRC decided to answer the club's queries that were raised, notwithstanding the fact that its policy was not to do so in a situation such as this. Therefore, having had such clear advice on the "village hall or similar" issue and without any indication from HMRC that there were any other conditions for the club to consider, the Upper Tribunal held that it was reasonable for the club to proceed on the basis that the works concerned qualified for zero-rating.

Accordingly the club's appeal was allowed. HMRC may consider a further appeal to the Court of Appeal.

Comment

The question in this case was not whether the new cricket pavilion qualified for zero-rating (that issue was decided against the club at the First-tier Tax Tribunal hearing), but was whether a penalty imposed by HMRC for the incorrect issue of a zero-rate certificate by the club to the contractor should be set aside.

UK VAT law imposes a penalty (of 100% of the VAT that would have been payable) in cases where HMRC consider that a certificate should not have been issued.

In this case, the club had written to HMRC seeking advice on whether the construction of the new pavilion could be zero-rated. HMRC issued a written response confirming that the works qualified. It was only later that HMRC discovered that the club was a CASC (and therefore not a charity) and, as a result, it resiled from the advice given and imposed a penalty.

The Upper Tribunal was satisfied that the FTT had made an error of law when it decided that the club did not have a reasonable excuse. In the circumstances, it considered that the club had acted reasonably. Whilst the advice did not create any sense of a legitimate expectation in a legal sense, it did constitute a reasonable excuse for the action that it took.

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